Nos. 11-246 & 11-247

IN THE

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,
Petitioner,

v.

DAVID PATCHAK, *ET AL.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF WAYLAND TOWNSHIP, WAYLAND AREA CHAMBER OF COMMERCE AND OTHER LOCAL GOVERNMENTS AND BUSINESS ASSOCIATIONS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are local government entities and business associations in southwest Michigan, a region that includes the 147-acre tract of land, known as the "Bradley Tract," at issue in this case.[1] The United States holds the Bradley Tract in trust for Petitioner Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Band"). The Band's economic development of the Bradley Tract provides substantial and much-needed economic benefits to *amici* and the local communities they serve.

Amici Wayland Township, Allegan County, Allegan Area Educational Service Agency, Wayland Union Schools, City of Wayland, Dorr Township, Martin Township, Hopkins Township, and Yankee Springs Township are local government entities in southwest Michigan that are engaged in cooperative efforts to foster economic development in an area that includes the Bradley Tract. Several of the *amici* local government entities have entered into a revenue sharing agreement with the Band pursuant to a compact between the Band and the State of Michigan that has been approved by the Secretary of the Interior on behalf of the United States. *Amicus*

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[1] Pursuant to this Court's Rule 37.6, the *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

Deputy Sheriff's Association of Michigan is an association of sheriffs' deputies whose members benefit from economic development of the Bradley Tract, which has generated revenues that are being used to hire and retain law enforcement officers.

Amici Wayland Area Chamber of Commerce, Allegan Area Chamber of Commerce, Kalamazoo Regional Chamber of Commerce, Dorr Business Association, West Michigan Hispanic Chamber of Commerce, Barry County Chamber of Commerce, Barry County Economic Development Alliance, and Gun Lake Business Association are business associations whose members benefit from the Band's economic development of the trust lands. For the local business entities, as for the local government entities, uncertainty over the status of the Bradley Tract created by the threat of continuing litigation deters investment and makes reliable long-term planning impossible. The businesses represented by the *amici* associations would suffer a devastating loss of revenue and jobs if the federal government's decision to take the Bradley Tract into trust were reversed and, as a result, the revenues generated by the Tribe's economic development efforts were to cease.

Amici submit this brief to explain the nature and extent of the benefits that development of the Bradley Tract has conferred on the local community, the importance of those benefits to local governments and businesses, and the substantial harm that would be caused by a legal regime that leaves the status of trust lands open to challenge over a long period of time.

INTRODUCTION AND SUMMARY OF ARGUMENT

Michigan's economic troubles in recent years have been the subject of national headlines.[2] Faced with high unemployment and a decimated automotive industry, Michigan has been described as "ground zero in the national economic downturn."[3] Local governments and business associations in southwest Michigan have worked diligently to increase economic activity and job growth, but recovery has been slow.[4]

The development of the Bradley Tract has provided a much-needed boost to southwest Michigan's battered economy. In February 2011, the Band completed and opened a $165 million gaming facility, known as Gun Lake Casino, on the Tract. The facility generates critically-needed economic benefits for local communities and businesses.

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[2] *See, e.g.*, Bethany Biron, *Granholm to Talk Michigan Economy at State of the State Address*, Mich. Daily (Feb. 2, 2010), http://www.michigandaily.com/content/granholm-give-last-state-state; Susan Saulny & Monica Davey, *New Economic Fears Arise in Michigan*, N.Y. Times (Nov. 22, 2008), http://www.nytimes.com/2008/11/23/us/23michigan.html.

[3] Saulny & Davey, *supra* note 2.

[4] *On Labor Day, High Unemployment in Michigan, but Hope for Better Things*, Grand Rapids Press (Sept. 4, 2011), http://www.mlive.com/opinion/grand-rapids/index.ssf/2011/09/on_labor_day_high_unemployment.html; Julia Bauer, *Unemployment Rises Again in West Michigan; Regional Labor Pool Also Shrinks*, Grand Rapids Press (Apr. 23, 2009), http://www.mlive.com/business/west-michigan/index.ssf/2009/04/unemployment_rises_again_in_we.html.

The opening of the gaming facility was preceded by a decade-long process. In 2001, the Band submitted a fee-to-trust application to the Secretary of the Interior requesting that the Bradley Tract be taken into trust under the Indian Reorganization Act for future use as a gaming facility. *See* 25 U.S.C. §§ 467, 2719. At the time, the Bradley Tract was the site of an abandoned manufacturing facility.

At the conclusion of an administrative review process, the Secretary issued a public notice ("Notice") that the Bradley Tract would be taken into trust for the Band. *See* 70 Fed. Reg. 25,596, 25,596-97 (May 13, 2005). As required by regulation, the Notice announced a 30-day waiting period before title to the land would pass to the United States. *Id.* at 25,596. The purpose of the waiting period is "to afford interested parties the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." *Id.* The Notice clearly stated that the Bradley Tract would be "used for the purpose of construction and operation of a gaming facility." *Id.*

During the 30-day waiting period, an anti-gambling organization named Michigan Gambling Opposition ("MichGO") filed suit in the U.S. District Court for the District of Columbia challenging the Secretary's decision to take the Bradley Tract into trust. No other suit challenging the Secretary's decision was filed within the 30-day window set forth in the Notice. Both the district court and the court of appeals considered MichGO's claims and rejected

them. *Mich. Gambling Opposition (MichGo) v. Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007), *aff'd on other grounds by Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008). Following the court of appeals' decision, the Secretary took title to the Bradley Tract and placed the land into trust on January 30, 2009. The Band proceeded with its plans to develop the trust lands and opened the gaming facility on February 10, 2011.

The Band's economic development efforts on the trust lands have directly created 900 new jobs and infused area hotels, restaurants, and other businesses with much-needed customers and revenues. Additionally, the Band has entered into a revenue sharing agreement with regional governments that provides essential resources for schools, roads, sewer and water systems, public safety programs, and other critical needs. The Band's economic development efforts have facilitated intergovernmental service-sharing agreements that are critical to the region's recovery.

The court of appeals' decision in this case threatens to unravel these economic benefits and the progress they have fostered. The D.C. Circuit held that (i) Respondent Patchak has prudential standing to challenge the Secretary of the Interior's authority to place the land into trust, even though the suit was filed *years* after expiration of the 30-day window set forth in the Notice and (ii) the United States is not immune from Patchak's suit under the Quiet Title Act, 28 U.S.C. § 2409a. If successful, Patchak's suit would divest the United States of title to the trust lands. Absent special legislation, the gaming facility

on the Bradley Tract would be required to close its doors. The *possibility* of such a disastrous result, even after the United States has taken title to the Bradley Tract under the Indian Reorganization Act, creates substantial economic uncertainty and instability for local governments and businesses in southwest Michigan.

It is difficult for *amici* to engage in long-term planning, develop and approve budgets, and implement strategies for business growth and economic development when a significant source of projected revenue is at risk. For example, local government *amici* are pursuing new initiatives, including initiatives requiring significant expenditures that will likely be financed through municipal bonds and repaid over time, that require a dependable source of revenues from the trust lands. Likewise, businesses that depend on additional demand for their products and services as a result of the development of the trust lands face additional uncertainty in deciding whether to expand and hire additional workers.

If Respondent's suit is permissible, other trust lands across the United States will be susceptible to similar instability and uncertainty. Under the court of appeals decision, title to any trust lands could be attacked by any person who alleges that his or her quality of life was adversely impacted by events that flowed from U.S. ownership of particular trust land. This would inflict substantial economic uncertainty on businesses and governments across the country. As a result of this uncertainty and instability, jobs

may be lost and government services may be delayed, scaled-back, or eliminated altogether.

ARGUMENT

The Court of Appeals' Decision Threatens the Critical Economic Benefits That Flow From Development Of The Trust Lands.

I. The Band's Development of the Trust Lands Provides Substantial Benefits to Local Businesses and Governments.

The Band's development of the trust lands is providing significant and much-needed economic benefits to local governments, businesses, and community residents. These benefits include job creation, other economic benefits, and improved government services.

A. Development of the Trust Lands Has Created Hundreds of New Jobs.

The economic development of the Bradley Tract created 900 new jobs in 2011.[5] These new jobs are vitally needed. Allegan County, in which the trust lands are located, reported an 11.9 percent unemployment rate in 2010 (more than two percentage points higher than the national

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[5] Janice Allen, *Casino's Success Causing Gun Lake to Add 200 Jobs*, Fox 17 TV (Mar. 21, 2011), http://www.fox17online.com/news/fox17-new-casino-adding-jobs-casinos-success-causing-gun-lake-to-add-200-jobs-20110321,0,6883335.story (noting that Gun Lake Casino employs more than 900 workers).

unemployment rate).[6] In addition to these 900 jobs, approximately 750 skilled workers — including plumbers, electricians, carpenters, and sheet metal workers[7] — were employed during the construction of the $165 million facility.[8] Development of the trust lands has also indirectly created an estimated 1,000 outside vendor jobs.[9] The creation of new jobs has resulted in an expanded tax base for local governments and increased demand for goods and services provided by local businesses.[10]

B. Development of the Trust Lands Has Generated Other Significant Economic Benefits.

The Band estimates that, as a result of its development of the trust lands, it will spend approximately $30 million annually to purchase

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[6] *County-Level Unemployment and Median Household Income for Michigan*, USDA Economic Research Service (updated Dec. 2, 2011), http://www.ers.usda.gov/data/unemployment/, then "Michigan" hyperlink.

[7] *Gun Lake Casino Opening Weekend Draws a Full House*, Sw. Mich.'s Second Wave (Feb. 17, 2011), http://swmichigan.secondwavemedia.com/devnews/casino0217.aspx.

[8] Herb Woerpel, *Tribe Secures $165 Million Loan for Gun Lake Casino*, Penasee Globe (July 20, 2010), http://www.mlive.com/penaseeglobe/index.ssf/2010/07/tribe_secures_165_million_loan.html.

[9] *Gun Lake Casino Opening Weekend*, *supra* note 7.

[10] Ryan Lewis, *Wayland School, Township Win Big Checks*, Allegan Cnty. News (July 27, 2011), http://www.alleganneWs.com/articles/2011/07/28/local_news/2.txt.

vendor goods and services.[11] Most of those purchases will be made from businesses in southwest Michigan, providing a further substantial boost to the local economy.[12]

In addition, the Band estimates that the gaming facility will create 60,000 new guest stays per year at area hotels, generating an additional $4.4 million in revenues for hotel operators.[13] Other local businesses, such as restaurants, gas stations, drycleaners, and landscapers, can expect similar increases in demand for their services.

C. Development of the Trust Lands Has Increased Local Government Revenues.

In May 2007, the Band and the State of Michigan entered into a Revenue Sharing Agreement ("Agreement"), which was approved by the Secretary of the Interior. Under the Agreement, the Band pays a percentage of the revenues from the gaming facility to local government entities located in close proximity to the trust lands.

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[11] Pete Daly, *Gun Lake Casino to Break Ground Sept. 17*, Grand Rapids Bus. J. (Aug. 31, 2009), http://www.grbj.com/GRBJ/ArticleArchive/2009/August/August+31/BREAKING+NEWS.htm.

[12] *Gun Lake Casino Opening Weekend*, *supra* note 7.

[13] *Wayland Casino to Break Ground Sept. 17*, Wood TV 8 (Sept. 3, 2009), http://www.woodtv.com/dpp/news/local/gun_lake_region/Wayland_casino_to_break_ground_September_17.

Pursuant to the Agreement, the Band and ten public agencies (each of which has joined this brief as an *amicus curiae*) created a Local Revenue Sharing Board ("the Board"). The Board is an independent legal entity charged with establishing criteria and formulas for distributing a portion of the revenues from the gaming facility to the local governments.

Distributions are made every six months. The first distribution was paid out in June 2011, after the gaming facility had been in operation for just two months. Local governments received $514,871, and the State of Michigan received more than $2 million. Local governments use the revenues generated by the trust lands to fund a variety of government programs and initiatives.

For example, Wayland Township will use part its first distribution to hire two additional patrol deputies to provide public safety services.[14] Wayland Union School District used $194,628.31 from the first distribution to :

- cut preschool tuition rates by one-third;[15]

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[14] Herb Woerpel, *Gun Lake Casino Disburses $7.8 Million in Slot Profits Locally, Statewide*, Penasee Globe (Dec. 1, 2011) http://www.mlive.com/penaseeglobe/index.ssf/2011/12/gun_lake_casino_disburses_78_m.html.

[15] Julie Makarewicz, *Wayland Union School District Finds Uses for Gun Lake Casino Payment*, Grand Rapids Press (Aug. 23, 2011), http://www.mlive.com/wayland/2011/08/wayland_union_school_district.html.

- eliminate a $100 per sport fee that high school students previously were required to pay in order to participate in school athletics;[16]
- establish a public improvement fund, which was used to the paint the ceiling of the high school gymnasium;[17]
- develop a scholarship fund for graduating seniors to encourage families to stay in the Wayland area;[18] and
- fund maintenance and capital projects, thereby freeing up funds for academic services.[19]

Local governments have relied on the Agreement to plan critical infrastructure projects and other initiatives that would not have been possible absent the Band's continued development of the trust lands. Wayland Township, for example, is

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[16] Lisa LaPlante, *No More Pay-to-Play for Wayland Wildcats, Thanks to Casino*, Fox 17 News (Aug. 24, 2011), http://www.fox17online.com/news/fox17-wayland-schools-no-more-paytoplay-for-wayland-wildcats-thanks-to-casino-20110824,0,4518511.story; *see also* Makarewicz, *supra* note 15.

[17] Woerpel, *supra* note 14.

[18] Lindsey Smith, *Gun Lake Casino's First Payout to State, Local Governments Top Expectations*, Mich. Radio, (June 2, 2011),http://www.michiganradio.org/post/gun-lake-casino%E2%80%99s-first-payout-state-local-governments-top-expectations.

[19] Makarewicz, *supra* note 15.

planning to construct a new water and sewer treatment system that would replace the current septic system and provide significant environmental benefits.[20] Wayland Township used its first distribution under the Agreement to undertake a feasibility study in connection with the proposed water and sewer system and enter into an option contract to buy property upon which to locate the new sewer and water system.[21]

The second distribution under the Agreement was made in November 2011 and totaled $1.56 million for local governments and $6.24 million for the State of Michigan.[22] Local governments intend to use this distribution to fund public works and services projects. For example, Martin Township may use its share to purchase a new fire truck.[23] Allegan County will use its distribution to avoid cutting services to residents and to fund services for seniors, road maintenance projects, and the county's veteran relief fund.[24] Dorr Township hopes to invest

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[20] *Wayland Twp Board Talks Casino Plans*, Wood TV 8 (Feb. 2, 2009), http://www.woodtv.com/dpp/news/Wayland_Twp_board_talks_casino_plans.

[21] Lewis, *supra* note 10.

[22] Woerpel, *supra* note 14.

[23] Sheila McGrath, *Casino Payments Go to Local Governments Earlier Than Planned*, Advance Newspapers (Dec. 29, 2011), http://www.mlive.com/wayland/index.ssf/2011/12/casino_payments_go_to_local_go.html.

[24] Ryan Lewis, *Casino Revenue Boosts Budgets for Schools, Townships*, The Commercial Record (Jan. 4, 2012), http://www.allegannews.com/articles/2012/01/05/

(continued...)

in projects that will benefit the whole community, such as playgrounds and parks.[25] Wayland Township schools will make capital improvements, strengthen its scholarship program, and replace some high school lockers, among other things.[26]

The Agreement has facilitated the efforts of local communities to improve their public safety programs and engage in collaborative intergovernmental agreements. For example, Wayland Township is using a portion of the funds generated by the trust lands to fund a contract with the Allegan County Sheriff's Department under which Allegan County will provide two deputies dedicated to patrolling Wayland Township.[27] This cooperative venture strengthens intergovernmental cooperation in addition to improving public safety.

The Tribe's economic development of the trust lands has provided benefits to local communities in addition to those provided under the Agreement. For example, the Band and Gun Lake Casino donated $12,000 to the Allegan County Sheriff's Department for the purchase of a police dog that can be used for "search and rescue tactics, locating a lost child, and identifying illegal substances."[28] The donation

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local_news/1.txt.

[25] McGrath, *supra* note 23.

[26] Lewis, *supra* note 24.

[27] Lewis, *supra* note 10.

[28] Press Release, Gun Lake Casino, Gun Lake Tribe and Gun Lake Casino Donate Police K-9 to Allegan County Sheriff's (continued...)

reflects a newly-forged partnership between the Band and local law enforcement that promises to benefit all of the area's residents.

II. The Decision of the Court of Appeals Undermines the Benefits Derived From Economic Development of the Trust Lands.

The court of appeals' decision threatens to cause significant economic hardship for residents of southwest Michigan by undoing the benefits that have resulted from economic development of the trust lands. If the Court holds that Respondent is authorized to proceed with this litigation, the Bradley Tract could be taken out of trust, and as a result the gaming facility could be shut down. Nine-hundred casino workers would lose their jobs, as would many other workers who are employed by businesses that provide goods and services to the gaming facility and its patrons. The casino would cease to purchase $30 million in goods and services each year, and area hotels would lose 60,000 new guest stays per year. Many local businesses would suffer, and some would not survive. Local governments would face a significant loss of revenues and substantially decreased demands for services.

Even the *risk* that litigants such as Respondent may divest the United States of title to

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Department (Aug. 25, 2011), http://www.mbpi.org/PDF/News/Press%20Releases/PR_K-9_Donation_8-25-11.pdf.

the Bradley Tract creates a significant obstacle to realizing the full benefits of the Band's economic development efforts. In order for businesses to make long-term investments, they must be reasonably confident that the investment will be worthwhile. If businesses are uncertain about the trust status of the Bradley Tract, they may delay or scale back their investment plans, thus reducing the positive effects of the Band's development of the Bradley Tract. For example, a hotel operator may put off plans to build a new hotel, or to expand an existing hotel, if it concludes that the status of the trust land, and therefore the casino, is uncertain.

Similarly, local governments must be able to rely on the federal government's decision to take the Bradley Tract into trust in order to undertake infrastructure improvements and adopt other long-term programs. Local governments cannot engage in responsible planning and budgeting if they do not know whether Gun Lake Casino will continue to operate. Three examples illustrate the problem.

First, as noted above, Wayland Township is planning to construct a $17 million environmentally-friendly wastewater treatment facility. The facility would virtually eliminate the need for area homes to use septic systems and would, as a result, advance Michigan's policy (set forth in a statute) favoring sanitary sewer systems over septic systems. *See* Mich. Comp. Laws § 333.12752. The continued operation of Gun Lake Casino is central to Wayland Township's efforts to build this facility. The Township has a purchase option on the land on which the system would be built and is currently in

the process of extending that option; it will not exercise that option if the gaming facility closes. Although the revenue sharing distributions will not directly and fully fund the construction of the system, the expected revenue distributions could be used as collateral to secure the necessary financing.[29]

Second, and related to the example above, is the fact that to fund the new wastewater treatment plant, Wayland Township will need to issue revenue bonds or special assessment bonds. The Township cannot issue those bonds without knowing whether the Band — the largest prospective user of the improvements — will continue to operate the casino and pay the fees that will enable the Township to repay the principal and interest on the bonds. *See* Mich. Comp. Laws §§ 141.107, 41.735.

Third, there is space to expand Gun Lake Casino if demand allows.[30] Expansion would likely result in further economic benefits to area governments and businesses. But expansion can occur only if the trust status of the land is stable and local governments and businesses can rely on it as a basis for economic planning.

These examples illustrate in concrete terms the kind of adverse impact the court of appeals' decision in this case will have on the governments and citizens of southwest Michigan.

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[29] Lewis, *supra* note 24.

[30] *Gun Lake Casino Opening Weekend*, *supra* note 7.

The Court's decision in this case will also have an impact that extends far beyond southwest Michigan. Local governments and businesses across the country rely on the federal government's title to trust lands as the foundation for planning and investment in connection with economic development of trust lands. If individuals such as Respondent are free to challenge the validity of the title to the trust long after the lands have been placed into trust status, when a business is already operating on the trust lands, then communities across the country will face the same economic uncertainty and instability that now confront *amici*. As a result, no one will be able to place full reliance on U.S. title to trust lands as a way of promoting economic growth and providing vital public services.

* * * * *

This Court has long held that a basic purpose of the law is to provide predictability. *See, e.g.*, *Regan v. New York*, 349 U.S. 58, 64 (1955) ("The law strives to provide predictability so that knowing men may wisely order their affairs . . . ."). Nowhere is this consideration more significant than in the context of title to real property. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) ("[P]redictability and stability are of prime importance" in the context of "contractual or property rights.") (citation and internal quotation marks omitted). The court of appeals' decision undermines this predictability and places local governments and businesses in an unstable position: they have opportunities to invest in and improve their communities and grow their economies, but

they do not know whether those resources will be taken away. It is therefore imperative that this Court reverse the judgment of the court of appeals.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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February 14, 2012